IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8359 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

THAKAR HARSADBHAI CHAMPAKBHAI

Versus

TALUKA DEVELOPMENT OFFICER

Appearance:

1. Special Civil Application No. 8359 of 1999

MR NIKHIL S KARIEL for Petitioner No. 1-3

DS AFF.NOT FILED (R) for Respondent No. 1

MR NAVIN K PAHWA for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 25/06/2004

ORAL JUDGEMENT

In this petition, the petitioners have challenged

the order passed by respondent no. 1 while exercising powers under Section 248 of the Gujarat Panchayat Act, 1993 [hereinafter referred to as "the Act"] dated 1st July, 1999 and consequential order passed by respondent no. 2 terminating the services of the petitioners dated 2nd July, 1999.

2. This litigation has a history behind it, which is required to be stated in brief.

2.1. The petitioners alongwith six other employees were employed by the respondent - Panchayat as daily wagers in its octroi department. It was during the months of April 1989 to June 1990, the petitioners together with other six raised demand for regularization of their services with the respondents, which ultimately, resulted into Reference before the Labour Court. It was numbered as Reference [L.C.D.] No. 31/90, in the Court of Labour Judge, Rajkot. It was their contention that they were working since 1st April, 1989 as Rojamdars, however, they had completed 240 days and they should be made permanent with effect from the date on which they completed 240 days. At the same time, the respondent Panchayat, submitted an application to the Labour Court under Section 33 being Approval Application No. 1 of 1991 seeking its approval to retrench those persons from the services as the octroi was to be abolished. At the end of the trial, the Labour Court, Rajkot by judgment and award dated 13th May, 1991 rejected the Reference of those employees and allowed Approval Application No. 1 of 1991. Thus, by the said award, respondent no. 2 was granted permission to discharge the petitioners and six others from the service in accordance with Section 25-F of the Industrial Disputes Act, 1947.

2.2. Against the said judgment and award, the petitioners and others preferred Special Civil Application no. 6589 of 1991 dated 31st January, 1992. This petition was dismissed by this Court, against which they filed Special Leave Petition before the Apex Court. It was numbered as S.L.P. No. 3266 of 1992. The Apex Court also dismissed the S.L.P. of the petitioners and others by order dated 11th March, 1992. In the meanwhile, the petitioners and other workmen were relieved from the service with effect from 29th February, 1992 by order dated 27th February, 1992.

2.3. It further appears from the record of this petition that another Reference being Reference case No. 669 of 1993 was preferred before the Labour Court at Bhavnagar, which ultimately came to be decided on 25th

July, 1996. By the said award, the Labour Court directed respondent no. 2 to reinstate the present petitioners and the aforesaid six employees on their original post. However, it did not pass any order with regard to the payment of backwages. Both namely, the workmen as well as respondent no. 2 approached this Court to challenge the award of the Labour Court passed in Reference case No. 669 of 1993. Respondent no. 2 preferred Special Civil Application No. 3784 of 1996 whereas, the petitioners preferred Special Civil Application No. 4740 of 1996. Both these petitions were decided by the learned Single Judge of this Court vide order dated 9th July, 1996. The learned Single Judge of this Court vide judgment dated 9th July, 1996, partly allowed Special Civil Application No. 3784 of 1996 filed by respondent no. 2 and quashed and set aside the award of the Labour Court in Reference Case No. 669 of 1993, subject to the condition that concerned nine workmen should be reinstated as daily rated workmen by respondent no. 2 with effect from 15th July, 1996 till the Reference which was remanded to the Labour Court was decided by it. Other petition namely Special Civil Application No. 4740 of 1996 filed by the petitioners and other workmen was also allowed and it was clarified that the backwages which are denied by the Labour Court on the ground that no demand was made by the petitioner was not true and the said conclusion of the Labour Court was erroneous. The learned Judge, ultimately, remanded the Reference for reconsideration of the Labour Court and also permitted respondent no. 2 to lead evidence. This decision was challenged in Letters Patent Appeal by respondent no. 2 being L.P.A. No. 737 of 1996 in Special Civil Application No. 3784 of 1996. The Division Bench of this Court by order dated 19th August, 1996, though did not disturbed the judgment of the learned Single Judge, but directed respondent no. 2 that, in lieu of no reinstatement for the present, it should deposit a sum of Rs.1,00,000=00 [Rupees One Lakh] before the Labour Court and the same to be invested in a Nationalised Bank initially for a period of six months on usual terms. The Labour Court was directed to record evidence of the Panchayat etc., and complete the proceedings on or before 31st December, 1996. A fresh decision was also directed to be given in a question of reinstatement, payment of backwages etc. Upon remand of the said proceedings before the Labour Court, respondent no. 2 appears to have entered into some settlement with the petitioners and other workmen and the Labour Court was requested to pass appropriate direction and dispose of the award on the line of settlement reached between them. In view thereof, the Labour Court made award in accordance with

the terms of the settlement dated 25th July, 1997. In view of the settlement, the petitioners and other workmen allowed to forego their claim for backwages since they were reinstated on their original post in the octroi department on daily wage basis. Subsequently, the petitioners on 16th June, 1998, raised industrial dispute for regularization on the said post. It was referred to the Industrial Tribunal for adjudication. The said Reference was numbered as Reference [I.T.] No. 101 of 1998. During the pendency of the said Reference, respondent no. 2 passed Resolution dated 26th February, 1999 at No. 61, authorizing its Sarpanch to enter into compromise with the petitioners and other employees and settled Reference Case No. 101 of 1998. Resolution No. 61 is passed in the General Meeting of respondent no. 2 held on 26th February, 1999. By the said Resolution, it was resolved that the Sarpanch be authorized to settle the disputes pending in the Court of law and while doing so, it should keep in view that the financial interest of respondent no. 2 - Panchayat was in no way jeopardied. This Resolution was acted upon by the Sarpanch of respondent no. 2, during adjudication of Reference No. 101 of 1998.

2.4. Subsequently, respondent no. 1 exercised power under Section 248 suo moto and cancelled Resolution No. 61 referred above. In his opinion, considering the fact that when the termination of the service of the petitioners and other employees had been approved by this Court as well as by the Apex Court, there was no need to reinstate them in service. Further that the settlement which was arrived at between the parties, dated 4th March, 1999 was against the interest of respondent no. 2 and also against the Rules and Regulations. He has observed that Sarpanch Mr. Baloch had misused his position as Sarpanch and had clothed himself with such powers, which were not in accordance with the Rules and Regulations and that was likely to cause considerable financial loss to respondent no. 2. In short according to respondent no. 1, the Sarpanch had acted arbitrarily and he had exercised power illegally and mala fide with a view to misuse his position. He, therefore, deserved to be relieved from the said position. For that purpose, he made recommendation to the District Development Officer. He, therefore, passed order under Section 249 of the Act and revoked Resolution no. 61 dated 26th February, 1999 and also directed respondent no. 2 that the workmen appointed as Octroi clerk with effect from 1st April, 1999 on permanent basis, be relieved from the service. He, further directed that appropriate steps be taken against Sarpanch Mr. Baloch.

2.5. As a consequence of the aforesaid order, respondent no. 2 by order dated 2nd July, 1999 relieved the petitioners from their services. The order of respondent no. 2 was challenged by filing Revision Application before the State Government under Section 259 of the Act, by the petitioners and other workmen. However, the State Government declined to interfere in the Revision Application and rejected it by order dated 10th September, 1999. Hence, this petition.

3. Mr. Nikhil Kariel learned advocate for the petitioners has submitted that the order of respondent no. 2 was illegal inasmuch as he did not have any power under Section 249 of the Act to revoke Resolution No. 61, which was not only duly passed by respondent no. 2, but it was duly acted upon also. He has further submitted that respondent no. 1 could not have nullified the award made by the Labour Court as well as the Industrial Tribunal in Reference Cases filed before them. He has also submitted that the said order does not reflect the correct facts and it has been passed on the facts which are not at all relevant for the purpose of exercising power under Section 249 of the Act. He has further submitted that exercising power under Section 249 of the Act to upset the awards of the Labour Court and the Industrial Tribunal would amount to respondent no. 2 sitting in Appeal over these decisions. He has further submitted that out of original nine workmen, one has already expired. Even after the impugned order, five workmen have been retained in service by respondent no. 2 whereas, the petitioners have been driven out.

3.1. As against that, Mrs. Sangeeta Pahwa learned advocate for the respondents has submitted that considering the chequered history of this litigation, it is very clear that the petitioners and other workmen were in collusion with respondent no. 2 in the beginning. Because of such collusion, even after the Supreme Court upheld the decision passed in favour of respondent no. 2 they had challenged the termination of their services in Labour Court and by virtue of the settlement, they were again taken back in service. According to her, the said settlement was totally against the interest of respondent no. 2. She has further submitted that when the application for Approval filed by respondent no. 2 seeking approval of the Labour Court for retrenchment workmen was granted and the said approval was confirmed even by the Apex Court, there was no question of said workmen filing Reference claiming reinstatement. According to her, considering the peculiar facts and

circumstances of the case, respondent no. 1 was completely justified in passing the impugned order. Lastly, she has submitted that there is no merit in this petition and it deserves to be dismissed.

4. Having carefully gone through the record of this petition and having considered the submissions advanced by learned advocates for the petitioners and the respondents, it is clear that the petitioners alongwith other six workmen were reinstated in service by virtue of award passed in Reference Case No. 669 of 1993 dated 25th July, 1997, in view of the settlement between the parties. Their service was terminated by respondent no. 2 as a consequence of order passed by respondent no. 1 dated 1st July, 1999. The order which is passed by respondent no. 1 is purported to be while exercising power under Section 249 of the Act. It is, therefore, necessary to reproduce the said Section:-

"249 : Suspension of execution of order :-

(1) If, in the opinion of the Taluka Development Officer the execution of any order or resolution of a panchayat subordinate to the taluka panchayat or the doing of anything which is about to be done, or is being done by or on behalf of such panchayat, is unlawful, he may by order in writing suspend, the execution or prohibit the doing thereof:

(2) When the Taluka Development Officer makes an order under sub-section (1), he shall forthwith send to the panchayat affected thereby a copy of the order, with a statement of the reasons therefor.

(3) The Taluka Development Officer shall forthwith submit to the District Development Officer a report of every case occurring under this Section and the District Development Officer may revise or modify any order made therein and make in respect thereof any other order which the Taluka Development Officer could have made.

(4) The District Development Officer in respect of a taluka panchayat or a village panchayat, shall have the same powers as Taluka Development Officer has in respect of a village panchayat under

sub-sections (1), (2) and (3) subject to the modification that he shall submit a report under sub-section (3) to the State Government. The State Government may pass such order thereon as it may deem fit.

(5) An officer authorized by the State Government in this behalf by a general or special order, shall in respect of a district panchayat, have the same powers as the District Development Officer has in respect of a taluka panchayat under this section.

(6) If in the opinion of the Collector the execution of any order or resolution of any panchayat or the doing of anything which is about to be done or is being done by or on behalf of such panchayat. is causing or is likely to cause injury or annoyance to the public or to lead to a breach of peace, the Collector may by order in writing suspend the execution or prohibit the doing thereof and shall forthwith :-

(a) send to the panchayat affected thereby a copy of the order, with a statement of the reasons therefor; and

(b) submit to the State Government a report thereof.

The title of Section itself reads as "Suspension of execution of order" It would give clear indication to the effect that the provisions of this Section are required to be exercised at pre-execution stage. Sub-section (1) thereof. confirms the power of Taluka Development Officer, If in his opinion, the execution of any order or resolution subordinate to the taluka panchayat or the doing of anything, which is about to be done, or is being done by or on behalf of such panchayat, is unlawful, he may by order in writing suspend the execution or prohibit the doing thereof. The words used in this sub-section are very clear and it shows that those powers are required to be exercised preventing the panchayat from executing any order or resolution which is found to be unlawful and/ or prevented it from doing anything which is about to be done or is being done by or on behalf of such panchayat. This provision, therefore, is to be

resorted to as a preventive measure and it cannot be resorted to after the things have been done or the resolution has been implemented or the order is executed. In other words, by resorting to powers under Section 249 of the Act, the Taluka Development Officer cannot get things undone which have already been done pursuant to the resolution or the order by the panchayat. In the instant case, it is already seen by us that the reinstatement of the petitioners and other workmen was made by virtue of the award that was passed on 25th July, 1997 in Reference Case No. 669 of 1993 and the petitioners were already discharging duty as Octroi Clerk though on daily wage basis since that day when the said award was passed pursuant to some settlement that was arrived between the panchayat and the concerned workmen. The said settlement is not on record. Whether it was presented before the Labour Court by the parties pursuant to any resolution passed by the respondent - panchayat, is also not on record. Be that as it may, the thing remains that the award was passed by the Labour Court which was also implemented by the respondent - panchayat and the petitioners were reinstated in service as Octroi Clerk. Thus, nothing remains to be done. Further, even for the subsequent proceedings filed by the petitioners before the Industrial Tribunal claiming regularization of their service, it had resulted into Reference bearing no. [I.T.] 101 of 1998 and respondent no. 2 had passed resolution no. 61, authorizing the Sarpanch to settle the litigation pending in the Court of law, keeping in view the financial interest of the panchayat and to see that it did not adversely affect it. By virtue of this settlement, the Industrial Tribunal also passed award dated 15th March, 1999 directing the respondent Panchayat to regularize the services of the petitioners and other workmen. Thus, the Reference pending before the Industrial Tribunal between the parties also ultimately culminated into passing of the award in favour of the petitioners. Thus, so far as regularization of the service was concerned, here also the Resolution was completely acted upon by the parties and by virtue of the said Resolution, settlement was presented before the Industrial Tribunal, and on that basis the award regularizing the services of the petitioners was passed. In the second instant also, things had reached to its logical end and nothing had remained to be done. In such circumstances, the question that arises is whether powers exercised by respondent no. 2 under Section 249 of the Act is proper, the answer obviously would be "no". The Apex Court had an occasion to examine such situation in light of the provisions of Section 34 (1-B) of the U.P. Municipalities Act, which are pari materia to the

provisions of Section 249 of the Act. The decision is rendered by the Apex Court in the case of Kannauj Municipality v. State of U.P. reported in A.I.R. 1971, S.C. 2147. The relevant portion of the said enactment is as under :-

> "(1-B). The State Government may, of its own motion or on report or complaint received by order prohibit the execution or further execution of a resolution or order passed or made under this or any other enactment by a board or a committee of a board or a joint committee or any officer or servant of a board or of a joint committee, if in its opinion, such resolution or order is prejudicial tot he public interest.

The Apex Court in light of the aforesaid provision has observed as under :-

> "The question, however, is whether, after the order of dismissal had been passed on the 9th April, 1964, the State Government had the power virtually to set aside or cancel the order under the cover of purporting "to prohibit the execution or further execution of that order." In our opinion, that sub-section does not clothe the State Government with such a power. The resolution of the Board or the order of a duly authorized officer of the Board is not liable to be canceled or set aside under this Section. All that could be done under it is to prohibit the execution or further execution of the resolution or order, or the doing or continuance by any person of any act in pursuance of or under cover of such resolution or order. Where the resolution or order does not require any acts to be performed or steps to be taken for the execution or further execution of the resolution or order of the Board or of its Officer, as in the present case, there is really nothing to prohibit."

Thus, the Apex Court has held that such provisions can be exercised only when the things are to be done, since the happening of such event could be prohibited. However, when the things are already done, there is nothing which could be prohibited or prevented from happening. The Apex Court also turned down the submissions to the effect that the power to prevent execution shall conform upon the State Government. It was also empowered to set aside or cancel the order. The facts of this case, therefore,

stand squarely covered by the ratio laid down by the Apex Court in this decision.

4.1. In another decision, cited by Mr. Kariel, the Full Bench of this Court in the case of Parshottambhai G. Chavda v. State of Gujarat reported in 1998 (1) G.L.H. 519, has compared the provisions of Section 34 (1-B) of the U.P. Act and Section 258 (1) of the Act. It may be noted here, that Section 258 (1) of the Act, confers similar power on the Collector. However, not only that but it further empowers the Collectors that whether execution of any work in pursuance of the order or resolution of Municipality is already commenced or completed, direct the Municipality to restore the position in which it was before the commencement of the work. In this decision, the Full Bench has also considered the decision of the Apex Court rendered in the case of Kannauj Municipality Board. It has thereafter laid down that while explaining distinction between the two provisions, the Full Bench has observed that unlike the provisions of Section 34 (1-B) of the U.P. Act, and Section 258 (1) of the Act, the Collector has power of restoration by directing the Municipality to restore the position in which it was before commencement of doing. Thus, the Full Bench has duly explained that provisions of Section 34 (1-B) would not apply to any Resolution or order which has already existed, even after it was passed or made. The provisions of Section 249 of the Panchayat Act as stated above are identical and, therefore, any power exercised to revoke the resolution or order of the panchayat, which is already acted upon or implemented will not be legal exercised of such power. Reverting back to the facts and circumstances of the case, it is very clear from the aforesaid direction that direction for reinstatement as well as for regularization by the Industrial Court were already made and implemented by the panchayat. So far as, subsequent award is concerned by the Industrial Tribunal, it is by virtue of Resolution No. 61 which is the subject matter of the order passed by respondent no. 2. When the things have already been done, and when the resolution or the orders have already been acted upon, the impugned order by respondent no. 2 would not have any legal affect on that. The exercise of such power by respondent no. 2 is, therefore. without any authority and illegal against the provisions of Section 249.

4.2. Apart from the fact that it is also based on some extraneous material the question to be decided whether respondent no. 1 by virtue of such order of respondent no. 2 could nullify the effect of award passed by

judicial forum created under Statutes, such as Labour Court or Industrial Tribunal, especially when they could have been challenged before the appropriate forum by filing appropriate proceedings. Again the answer would be "no". The order of respondent no. 2 dated 2nd April, 1996, terminating the service of the petitioners clearly show that before passing it, the order of respondent no. 1 has been taken into consideration and it is thereafter stated that for implementing Resolution no.61 dated 26th February, 1999, respondent no. 1 is likely to suffer financial loss. It was, therefore, decided that their service would stand terminated with effect from 2nd July, 1999. Resolution No. 61 is sought to be revoked. This order is as stated above, is solely based on order dated 1st July, 1999. Respondent no. 1 has also thereafter form opinion that Resolution No. 61 would cause financial loss to it. It may be noted here, that so far as Resolution No. 61 is concerned, it was passed when the proceedings for regularization of service was pending before the Industrial Tribunal and in the said proceedings the Sarpanch was authorized to arrive at a settlement with opposite parties keeping in view the fact that such settlement may not adversely affect the financial position. This settlement was presented before the Industrial Tribunal and accordingly award for regularization of the service of the petitioner was granted and by virtue of the same, the petitioners service was regularized with effect from 1st July, 1999 as can be seen from order dated 2nd July, 1999. Assuming that the powers exercised by respondent no.2 under Section 259 of the Act were legally exercised, then it could have affected the award of the Industrial Tribunal and not the award of the Labour Court which was passed way back in the year 1997 and prior to the date of order of respondent no. 2. One fails to under stand that respondent no. 1 could have taken shelter under the impugned order dated 1st July, 1999 passed by respondent no. 2 for terminating the services of the petitioners per se, such action is illegal and arbitrary and it is required to be quashed and set aside.

4.4. It is further required to be noted that the respondent - panchayat has retained in service five persons, who are similarly situated and who had got into the employment by virtue of the Labour Court's award and their services were regularized by virtue of the Industrial Tribunal's award. These are the workmen who have been filing litigation alongwith the petitioners right from the beginning and their case and the petitioners case in any way is different. However, because for the reasons best know to respondent no. 1

and also respondent no. 2 it is only the petitioners whose services have been terminated and other five are still in service. This is nothing but hostile discrimination vis-a-vis the petitioners, even on that count also the impugned orders are required to be quashed and set aside.

4.5. Mrs. Pahwa during the course of the hearing has submitted that this is nothing but the fraud played by the petitioners and other workmen. However, when the learned Single Judge of this Court and the Division Bench of this Court have issued certain directions including interregnum direction in respect of Reference Case no. 669 of 1993, there is hardly any case for this Court to come to a conclusion, that there was fraud played or that the petitioners and other workmen as well as panchayat were hand in glow and they had deliberately and with malafide intention arrived at a compromise and get the award passed in terms of such compromise.

5. Thus, considering the overall circumstances of the case, the impugned order of respondent no.2 dated 1st February, 1999 and the consequential award passed by respondent no. 1 dated 2nd July, 1999 are illegal and required to be quashed and set aside and they are hereby, ordered to be quashed and set aside.

5.1. So far as the payment of incidental benefits including with backwages are concerned, considering the fact that the petitioners are at present out of job since the time their service was terminated, it is required to be seen that whether they should be given full backwages. Though there is no evidence on their having been gainfully employed elsewhere, the fact remains that a person would find out even some job to sustain himself and his family. In the circumstances, in my opinion, ends of justice would meet, if the order of payment of 50% of backwages is passed together with all the incidental benefits. Respondent no. 1 is directed to pay 50% of the backwages from the date of termination till reinstatement to the petitioners, together with all incidental benefits after their reinstatement on the original post with continuity of service.

Thus, the result is that this petition is allowed. Rule is made absolute to the aforesaid extent with no order as to costs.

[AKSHAY H. MEHTA, J.]

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